MOHD ALIAS IBRAHIM A

v.

RHB BANK BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR B
MOHD ZAWAWI SALLEH J
[SUIT NO: D-22A-74-2010]
25 APRIL 2011
[2011] CLJ JT(2)

C

BANKING: *Islamic banking - Shariah Advisory Council - Roles and functions - Sections 56, 57 Central Bank of Malaysia Act 2009 - Court to refer questions concerning Shariah matter to Syariah Advisory Council - Court to be bound by ruling - Whether a usurpation of court's judicial power - Whether Act and ss. 56, 57 valid laws - Whether unconstitutional - Central Bank of Malaysia Act 1958 (Repealed), s. 16 - Central Bank of Malaysia Act 2009, ss. 51, 56, 57 - Federal Constitution, arts. 74, 121(1), 128, Ninth Schedule* D

BANKING: *Islamic banking - Shariah Advisory Council - Roles and functions - Rulings of Shariah Advisory Council - Whether constituting expert opinion - Whether amounting to collective itjihad - Whether not a fatwa - Whether binding on civil courts - Central Bank of Malaysia Act 2009, ss. 56, 57* E

CONSTITUTIONAL LAW: *Courts - Forum for trial - Reference of questions of law - Central Bank of Malaysia Act 2009 and ss. 56, 57 thereof, constitutionality of - Whether to be heard by the High Court or Federal Court - Federal Constitution, arts. 121(1), 128 - Courts of Judicature Act 1964, s. 84* F

G

CONSTITUTIONAL LAW: *Courts - Judicial power - Judicial power of High Court - Islamic banking and finance - Court to refer questions concerning Shariah matter to Syariah Advisory Council and be bound by its ruling - Whether a usurpation of court's judicial power - Enabling provisions thereof - Whether unconstitutional - Central Bank of Malaysia Act 2009, ss. 56, 57 - Federal Constitution, arts. 121(1), 128 - Courts of Judicature Act 1964, s. 84* H

ISLAMIC LAW: *Banking and Finance - Shariah Advisory Council - Roles and functions - Sections 56, 57 Central Bank of Malaysia Act 2009 - Court to refer questions concerning Shariah matter to Syariah Advisory Council and be bound by its ruling - Whether a usurpation of* I

court's judicial power - Whether unconstitutional - Rulings by Shariah Advisory Council - Whether an expert opinion - Whether a collective itjihad - Whether binding on civil courts - Central Bank of Malaysia Act 1958 (Repealed), s. 16 - Central Bank of Malaysia Act 2009, ss. 51, 56, 57 - Federal Constitution, arts. 74, 121(1), Ninth Schedule

The plaintiff had sought to construct a bungalow house on a piece of land and for the purpose had applied for and obtained several Islamic banking facilities from the first defendant. Subsequently, by a vesting order dated 8 March 2005, the rights and liabilities of the first defendant in respect of the facilities were vested in the second defendant. Misunderstandings arose between the plaintiff and the defendants in respect of the disbursement of monies under the facilities to the contractor when the bungalow house was found to be unfit for occupation, and, following that, a suit was filed by the plaintiff to declare the facility agreements void and of no effect. The defendants applied, *albeit* unsuccessfully, to strike out the plaintiff's claim. The facts showed that, during the striking out application, certain shariah issues had arisen which needed a reference to the Shariah Advisory Council ('SAC') pursuant to ss. 56 and 57 of the Central Bank of Malaysia Act 2009 ('Act 701'). The plaintiff however entertained the view that Act 701, and the said ss. 56 and 57 ('Impugned Provisions'), were *ultra vires* the Federal Constitution ('Constitution') and, seeking to declare the same as invalid, posed the following questions for the determination of the court: (1)(a) whether by the Impugned Provisions making the ruling of the SAC binding on the court, the SAC was actually usurping the judicial power of the court as housed in art. 121(1) of the Constitution; (1)(b) whether the Impugned Provisions had in effect delegated the decision-making power of the court relating to matters of Islamic financial business to the SAC and were, on that score, inconsistent with art. 121(1) of the Constitution; (2) whether by the Impugned Provisions making the ruling of the SAC binding on the court, the parties had been deprived of their right to be heard, and in any case whether such deprivation: (a) was in breach of the Constitution; and (b) constituted a breach of natural justice; and (3) whether the Impugned Provisions could have retrospective effect on Islamic banking transactions which occurred prior to the date of the coming into force of Act 701. The questions aside, an argument was also raised that the questions thus posed, rightly and

properly, ought to be heard by the Federal Court and not the High Court, and that being so, it fell upon the learned judge to further answer the question of whether the High Court herein constituted the proper forum to hear and dispose of the issues raised.

Held (answering questions in the negative and refusing declaration):

(1) Considering the provisions of art. 121 of the Federal Constitution and s. 84 Courts of Judicature Act 1964, and the fact that the Impugned Provisions are valid federal laws 'in respect of ascertainment of Islamic law for purposes of civil law' enacted by Parliament pursuant to Item 4(k) of the Federal List (List I) in the Ninth Schedule of the Constitution, this court has the jurisdiction to determine the questions posed and the plaintiff's preliminary objection on this point must fail. (paras 15-19)

(2) The practice of the civil courts referring questions on Islamic law to Islamic authorities is not something new. This is evident *vide* authorities such as *Re Dato' Bentara Luar (decd) Haji Yahya bin Yusof & Anor v. Hassan bin Othman & Anor, Isa Abdul Rahman & Satu Lagi lwn. Majlis Agama Islam, Pulau Pinang, Halimatussadiah v. Public Service Commission, Malaysia & Anor* and *Dalip Kaur Gurbux Singh v. Pegawai Polis Daerah (OCPD), Bukit Mertajam & Anor.* (paras 128-131)

(3) In Malaysia, although Islamic law falls under the jurisdiction of the Syariah Courts, in cases involving banking transactions based on Islamic law principles, it is the civil courts that will have jurisdiction to hear the matters. The reason is that the law relating to finance, trade, commerce and industry falls within the Federal List (List I) in the Ninth Schedule of the Constitution. That notwithstanding, by virtue of Act 701 and the Impugned Provisions, for questions concerning a Shariah matter, the civil court is bound to take into consideration any published rulings of the SAC or refer such questions to the SAC for its ruling and any such ruling made shall be binding on the court. This binding effect came about as a result of the substitution of the word "may" in s. 16 of the repealed Central Bank of Malaysia Act 1958 with the word "shall" in s. 56 of Act 701. (paras 62-68 & 73)

(4) The Constitution has given the power to Parliament to make laws with respect to any of the matters enumerated in the Federal List which includes "the ascertainment of Islamic law and other personal laws for purposes of federal law" (see art. 74 and Item 4(k)). Act 701 is a federal law and its contents are consistent with the words employed in the Constitution. In this sense, it can therefore be seen that the SAC is not in a position to issue a new Hukm Syarak but only to find out which one of the available hukm is best applicable in Malaysia for the purpose of ascertaining the relevant Islamic laws concerning the question posed to them. (para 95)

(5) It is to be noted that the root word "ascertain" used in s. 51 of Act 701 is also used in Item 4(k) of the Federal List in the Ninth Schedule of the Constitution. This similarity is of important significance and not a mere coincidence, since the State List in the Ninth Schedule uses the word "determination" instead and states that the jurisdiction of the State is for "the determination of matters of Islamic law". In any case, since the keyword here is "ascertainment of Islamic law", it follows that, if the court were to refer any question under s. 56(1) of Act 701 to the SAC, the SAC is merely required to make **an ascertainment,** and **not determination,** of Islamic laws relating to the question. (paras 85 & 87-88)

(6) The issue of whether the facility is Shariah compliant or not is only one of the issues to be decided by the court. And although the ascertainment of Islamic law as made by the SAC will be binding on the court as per the Impugned Provisions, it will be up to the court to apply the ascertained law to the facts of the case. The court still has to decide the ultimate issues which have been pleaded. Consequently, the final decision remains with the court. (para 96)

(7) The sole purpose of establishing the SAC is to create a specialized committee in the field of Islamic banking to ascertain speedily the Islamic law on financial matters so as to command the confidence of all in terms of the sanctity, quality and consistency of the interpretation and application of Shariah principles pertaining to Islamic finance transactions before the court. The SAC cannot be said to

be performing a judicial or quasi-judicial function as the process of ascertainment has no attributes of a judicial decision. Hence, this is not an attempt by the executive to take over the judicial power traditionally exercised by the courts. (paras 102, 105 & 106)

(8) The rulings as passed by the SAC constitute a form of expert opinion in the matter of Islamic finance. Further, considering that its members were highly qualified in the fields of Shariah, economics, banking, law and finance and appointed based on standards enunciated in s. 53 of Act 701, every such ruling, in the context of Islamic banking and takaful, can also be regarded as a collective *itjihad*. Within the contexts of administration of Islamic laws in Malaysia, these rulings, however, are not fatwas. (paras 107, 109- 110 & 120

(9) There is neither rhyme nor reason for this court to reject the function of the SAC in ascertaining which Islamic law is to be applied by the court in deciding the matter in question. Consequently, and for the reasons stated, the court would answer questions 1(a), 1(b), 2(a), 2(b) and 3 in the negative. The court would further agree with the *amicus curiae* that the issue of the plaintiff's right to be heard is premature, as the SAC has yet to publish its procedure and the plaintiff cannot at this instance prove that he has a right to be heard or been denied such right. (paras 122 & 133)

(10) Act 701 carries no retrospective effect. In any case, since there is no limitation imposed on the SAC in the performance of its statutory duties under the Act prior to 25 November 2009 (the date the Act came into force), the court would not add or infer any term to suggest any cut-off point to Act 701. The issue of retrospective effect is also of no relevance since this case was registered on 28 January 2010. (para 141)

(11) This is the first time the court is dealing with the new ss. 56 and 57 of the Central Bank of Malaysia Act 2009. That being so there would be no order as to costs. (para 143)

A ***Obiter:***

(1) To ignore the functions of the SAC is to open a flood gate for lawyers and cause a tsunami of applications to call any expert at their own interest and benefit, not only from
B Malaysia but also from other countries who might not be familiar with our legal system, administration of Islamic law and local conditions, just to challenge the Islamic banking transactions in this country. (paras 122 & 125)

Case(s) referred to:

C *Ah Thian v. Government of Malaysia [1976] 1 LNS 3* ***(refd)***

Arab-Malaysian Finance Bhd v. Taman Ihsan Jaya Sdn Bhd & Ors; Koperasi Seri Kota Bukit Cheraka Bhd (Third Party) And Other Cases [2009] 1 CLJ 419 ***(refd)***

Bank Islam Malaysia Berhad v. Lim Kok Hoe & Anor And Other Appeals
D *[2009] 6 CLJ 22 CA* ***(refd)***

Bank Kerjasama Rakyat Malaysia Bhd v. Emcee Corporation Sdn Bhd [2003] 1 CLJ 625 CA ***(refd)***

Bell Express Vu Limited Partnership v. Rex [2002] 2 SCR 559 ***(refd)***

Bharesh D Parish v. Union of India [2005] 5 SCC 421 ***(refd)***

Cooper v. Wilson & Ors [1937] 2 KB 309 ***(refd)***
E *Dalip Kaur Gurbux Singh v. Pegawai Polis Daerah (OCPD), Bukit Mertajam & Anor [1991] 3 CLJ 2768; [1991] 1 CLJ (Rep) 77 SC* ***(refd)***

Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd [2004] 1 CLJ 701 FC ***(refd)***

Hjh Halimatussadiah Hj Kamaruddin v. Public Service Commission Malaysia & Anor [1992] 1 CLJ 413; [1992] 2 CLJ (Rep) 467 HC ***(refd)***
F *Haryana Financial Corpn v. Jagdamba Oil Mills [2002] 3 SCC 496* ***(refd)***

Isa Abdul Rahman & Satu Lagi lwn. Majlis Agama Islam, Pulau Pinang [1996] 1 CLJ 283 ***(refd)***

Lachman Das v. State of Punjab [1963] 2 SCR 253 ***(refd)***

Lee Kwan Woh v. PP [2009] 5 CLJ 631 FC ***(refd)***

Lee Lee Cheng v. Seow Peng Kwang [1958] 1 LNS 32 HC ***(refd)***
G *Multi-Purpose Holdings Bhd v. Ketua Pengarah Hasil Dalam Negeri [2006] 1 CLJ 1121 CA* ***(refd)***

Petroliam Nasional Bhd v. Nik Ramli Nik Hassan [2003] 4 CLJ 625 FC ***(refd)***

PP v. Kok Wah Kuan [2007] 6 CLJ 341 FC ***(refd)***
H *PP v. Oh Keng Seng [1976] 1 LNS 107 HC* ***(refd)***

PP v. Dato' Yap Peng [1987] 1 CLJ 550; [1987] CLJ (Rep) 284 SC ***(refd)***

R v. Sharpe [2001] 1 SCR 45 ***(refd)***

Re Dato' Bentara Luar (decd) Haji Yahya Yusof & Anor v. Hassan Othman & Anor [1982] 1 LNS 16 ***(refd)***

Rizzo & Rizzo Shoes Ltd (Re) [1998] 1 SCR 27 ***(refd)***
I *RK Garg v. Union of India [1981] 4 SCC 675* ***(refd)***

Tan Sri Abdul Khalid Ibrahim v. Bank Islam Malaysia Bhd & Another Case [2010] 4 CLJ 388 HC ***(refd)***
Tan Sri Dato' Tajuddin Ramli v. Pengurusan Danaharta Nasional Bhd & Ors [2002] 2 CLJ 758 ***(refd)***
Tan Sri Eric Chia Eng Hock v. PP [2007] 1 CLJ 565 ***(refd)***
Tribunal Tuntutan Pembeli Rumah v. Westcourt Corporation Sdn Bhd & Other Appeals [2004] 2 CLJ 617 ***(refd)***
YAB Dato' Dr Zambry Abd Kadir & Ors v. YB Sivakumar Varatharaju Naidu; Attorney-General Malaysia (Intervener) [2009] 4 CLJ 253 ***(refd)***

Legislation referred to:
Central Bank of Malaysia Act 1958 (Repealed), ss. 16B(8), (9)
Central Bank of Malaysia Act 2009, ss. 51(2), 52(2), 53, 56(1)(b), 57
Child Act 2001, s. 97
Courts of Judicature Act 1964, s. 84
Criminal Procedure Code, s. 418A
Federal Constitution, arts. 4(1), 5, 8, 74(2), 75, 121(1), 128(1)(a)
Rules of the High Court 1980, O. 18 r. 19(1)(a), (b), (c), (d), O. 33 r. 2

Other source(s) referred to:
Abdul Rahman I Doi, *Non Muslim Under Shariah (Islamic Law),* Ta Ha Publishers Ltd, London, 1978, p 6
Al-Ghazali, *Al-Mustasfa fi Ilm al-Usul,* Beirut, Dar al-Kutub al-Ilmiyyah, 1993, 1st edn, p 345
Al-Harrani & Ahmad Hamdan, *Sifat al-Fatwah,* Beirut, al-Maktab al-Islami, 1977, p 16
Al Taymiyyah, *Al-Musawwaddah fi Usul-Fiqh,* Cairo, Al-Madani press, (ND), pp 487-490
EA Driedger, *Constitution of Statutes,* 2nd edn, 1983, p 87
Ibn Qayyim Al-Jawziyah, *I'lam al- Muwaqqi'in 'An Rabb al-'Alamin,* vol III, edn, Mahyu al-Din Abd. Hamid, Cairo, 1950, p 1
Imran Ahsan Khan Nyazee, *Theories of Islamic Law: The Methodology of Ijtihad,* Islamic Book Trust, Kuala Lumpur, 2002, p 287
Mohammad Hashim Kamali, *An Introduction to Shariah,* Ilmiah Publishers, 2006, pp 22, 91, 156
Moshe Yegar, *Islam and Islamic Institutions in British Malaya: Policies and Implementation,* p 165

For the plaintiff - Firoz Hussein (Cheng Mai with him); M/s Hafarizam Wan & Aisha Mubarak
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Reported by Wan Sharif Wan Ahmad

A

JUDGMENT

Mohd Zawawi Salleh J:

Introduction

B **[1]** This application concerns fundamental questions about the constitutional validity of ss. 56 and 57 of the Central Bank of Malaysia Act 2009 (Act 701) ("Impugned Provisions"). By way of notice of motion (encl. 14) pursuant to O. 33 r. 2 of the Rules of the High Court 1980, the plaintiff posed three questions for the C court's determination. The three questions posed were as follows:

Question 1

Pursuant to art. 4(1) of the Federal Constitution, whether ss. 56 and 57 of the Central Bank of Malaysia Act 2009 are D inconsistent with art. 121(1) of the Federal Constitution and therefore, to the extent of such inconsistency, are void, on the following grounds:

a) by making the ruling of the Shariah Advisory Council E binding upon the court, whether the Shariah Advisory Council is usurping the jurisdiction of the court in determining issues of law which are properly within the jurisdiction of the court as provided by the art. 121(1) of the Federal Constitution and the Courts of Judicature Act F 1964;

b) whether in the absence of an express provision allowing the judiciary to delegate its judicial powers to any other person or body, whether ss. 56 and 57 of the Central G Bank of Malaysia Act 2009 are inconsistent with art. 121(1) of the Federal Constitution in that ss. 56 and 57, in effect, delegates the decision making power of the court relating to matters of Islamic financial business to the Syariah Advisory Council, or in the alternative, whether H the court can abdicate its jurisdiction to make a decision to the Syariah Advisory Council.

Question 2

Whether by making the ruling of the Shariah Advisory Council I binding upon the court pursuant to s. 56 and 57 of the Central Bank of Malaysia Act 2009, and therefore, binding

upon the parties in such litigation, whether such parties are being deprived of their right to be heard, as there are no provisions to enable parties to address the Shariah Advisory Council. In the circumstances, whether:

a) the right of litigants to be heard in court is a constitutional right as the courts are constituted in a manner to provide for litigants to be heard, and therefore, whether the deprivation of such right is in breach of the Constitution;

b) there is a breach of natural justice and procedural fairness.

Question 3

Whether s. 56 and 57 of the Central Bank of Malaysia Act 2009 can have retrospective effect on transactions which occurred prior to the date the said legislation came into effect, namely before 25 November 2009? Whether a party who entered into Islamic banking transactions prior to the said date can be forced to be bound by the Syariah Advisory Council's decision when at the time they entered into such Islamic banking transaction, decisions of Syariah Advisory Council was not binding in court and therefore, the party had never submitted to the jurisdiction of the Syariah Advisory Council

[2] Realizing that these questions have serious implication on orderly development of the Islamic banking industry in Malaysia and with the consent of the parties, the court decided to invite the Attorney General's Chambers and Bank Negara Malaysia as *amicus curiae* to proffer their views on the matter. The Attorney General Chambers and Bank Negara Malaysia kindly responded to the invitation and Datin Azizah Nawawi (assisted by Arik Sanusi Yeop Johari) appeared on behalf of the Attorney General Chambers whilst Tan Sri Cecil Abraham (assisted by Rishwant Singh) appeared on behalf of Bank Negara Malaysia. The court wishes to place on record it's gratitude for the assistance rendered.

[3] The court heard the rival submissions on 28 February 2011. Thereafter, the plaintiff requested some time to reply to the points raised by the defendants, Attorney General's Chambers and Bank Negara Malaysia. The court took time to consider the questions posed.

A **Background Facts**

[4] It would be convenient to set out the relevant background facts of the case to aid in the understanding of the context in which the questions are posed.

B **[5]** Through a Sale and Purchase Agreement dated 25 August 2003 ("the Land Agreement"), the plaintiff had agreed to purchase from Messrs Gema Padu Sdn Bhd ("Gema Padu") properties identified as Lot No. BL/068 and Lot No. BL/069 ("the land"), somewhere within the Kota Warisan Project.

C **[6]** Pursuant to the Land Agreement, the plaintiff then entered into a Building Agreement dated 25 August 2003 where the plaintiff agreed, *inter alia*, to appoint Messrs Globemax Corporation Sdn Bhd ("Globemax") as the turnkey contractor to construct and D complete a detached house on the said land.

The 1st Defendant's Relationship In This Suit

[7] The relationship between the plaintiff and the 1st defendant started when the latter granted the former with Bai Bithaman Ajil E Facility ("BBA Facility") and Cash Line facility based on Bai' 'Inah principle ("Cash Line Facility") in respect of the above said properties and project by virtue of the following facilities agreements:

F (i) Facility Agreement For Cash Line Facility dated 29 January 2004;

(ii) Asset Sale Agreement For Cash Line Facility dated 29 January 2004;

G (iii) Asset Purchase Agreement For Cash Line Facility dated 29 January 2004;

(iv) Property Purchase Agreement dated 29 January 2004; and

H (v) Property Sale Agreement dated 29 January 2004.

The 2nd Defendant's Relationship In This Suit

[8] The relationship with the 2nd defendant on the other hand begun upon the vesting order granted on 8 March 2005 *via* suit I no: D8-24-79-2005 in Kuala Lumpur where all assets, rights and liabilities of the 1st defendant in respect of Islamic Banking Business were vested in the 2nd defendant.

[9] The plaintiff is claiming, *inter alia*, for: A

(1) a declaration that the facilities agreements dated 29 January 2004 executed between the plaintiff and the defendants are void and of no effect;

(2) an order that: B

(a) an account be made for all monies paid by the plaintiff to the defendants to date;

(b) the defendants pay to the plaintiff all such monies that the plaintiff had so paid; C

(3) alternatively, that the defendants, whether jointly and/or severally, pay the plaintiff damages, with such damages to be assessed; D

(4) interest;

(5) costs; and

(6) any further relief as this court deems fit. E

[10] In essence, the plaintiff claims that the 1st defendant had failed to ascertain the validity of the underlying transaction which is the basis of the facilities in question and that the 2nd defendant was in breach of the facilities agreement when they made payment to Gema Padu, the developer and Globemax, the contractor when F there was no issuance of certificate of practical completion by the architect. It was claimed that this caused the erected bungalow to be unfit to be used. Consequently the plaintiff suffered loss and damages.

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[11] On 18 May 2010, the 1st defendant filed a striking out application against the plaintiff's claim pursuant to O. 18 r. 19(1)(a) to (d) of the Rules of the High Court 1980. However, the striking out application was dismissed by my learned sister, Rohana Yusuf J, on 21 July 2010. H

[12] During the striking out application, it appears that there were some issues which merit the reference to the SAC pursuant to Act 701. Upon such realization, the plaintiff immediately filed this interlocutory application to move this court to answer the three questions as mentioned earlier. I

A **Preliminary Issue**

[13] At the commencement of the hearing of this application, learned counsel for the plaintiff, Mr. Firoz Hussein has taken a preliminary objection regarding this court's jurisdiction in answering the three questions as it was contended that the proper quorum to hear the matters is the Federal Court pursuant to art. 128(1)(a) of the Federal Constitution which reads as follows:

B

Article 128: Jurisdiction of Federal Court

C (1) The Federal Court shall, to the exclusion of any other court, have jurisdiction to determine in accordance with any rules of court regulating the exercise of such jurisdiction:

(a) any question whether a law made by Parliament or by the Legislature of a State is invalid on the ground that it D makes provision with respect to a matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws; and

[14] According to learned counsel, since the questions posed in E this application revolve around the power of the Parliament to make a law concerning the delegation of judicial power of the Federation to SAC, the court should refer the questions to the Federal Court pursuant to s. 84 of the Courts of Judicature Act 1964 (Act 91).

F **[15]** Both *amicus curiae* took a common stand that this court had jurisdiction to determine the questions posed. They submitted this issue by laying down two propositions of the relevant laws. The first is the provision that determines the issue of judicial power. This is provided in art. 121 of the Federal Constitution. It reads G as follows:

Article 121: Judicial power of the Federation

(1) There shall be two High Courts of co-ordinate jurisdiction and status, namely:

H

(a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry at such place in the States of Malaya as the Yang di-Pertuan Agong may determine; and

I

(b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;

(c) (Repealed),

and such inferior courts as may be provided by federal law and **the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.** (emphasis added)

[16] The second is that the Impugned Provisions were made pursuant to Item 4(k) of List I in the Federal List of the Ninth Schedule to the Federal Constitution. Item 4(k) allows Parliament to make law in respect of ascertainment of Islamic law for purposes of civil law. For ease of reference, Item (4) states as follows:

Ninth Schedule

[Articles 74, 77]

Legislative Lists

List I - Federal List

4. Civil and criminal law and procedure and the administration of justice, including –

(k) Ascertainment of Islamic law and other personal laws for purposes of federal law;

[17] Hence, the impugned provisions are valid federal laws enacted by Parliament. By virtue of s. 84 of the Courts of Judicature Act 1964 (Act 91), the entire discretion lies on this court whether to refer or not to refer this matter to the Federal Court.

[18] This court is in full agreement with the proposition of laws and the conclusion that was advanced by the *amicus curiae*. In *Ah Thian v. Government of Malaysia* [1976] 1 LNS 3, Suffian LP explained that under our Constitution, written law may be invalid on three grounds which are:

(1) In the case of Federal written law, because it relates to a matter with respect to which Parliament has no power to make law, and in the case of State written law, because it relates to a matter which respect to which the State legislature has no power to make law, art. 74; or

(2) In the case of both Federal and State written law, because it is inconsistent with the Constitution, see art. 4(1); or

(3) In the case of State written law, because it is inconsistent with Federal law, art. 75.

The court has power to declare any Federal or State law invalid on any of the above three grounds.

He also said:

> The doctrine of the supremacy of Parliament does not apply in Malaysia. Here we have a written constitution. The power of Parliament and of State legislatures in Malaysia is limited by the Constitution, and they cannot make any law they please.

To which, he went on to say:

> True the learned Judge has power under s. 48 of the Courts of Judicature Act 1964 (LM Act 91) to stay the proceedings before him and refer a matter like this to the Federal Court. He has not however done so in this case (this is an application by the accused). But in any event matters like this as a matter of convenience and to save the parties time and expense are best dealt with by him in the ordinary way, and the aggrieved party should be left to appeal in the ordinary way to the Federal Court.

[19] Relying on the premise that the Impugned Provisions are valid federal laws enacted by Parliament which is within the jurisdiction and powers of this court as well as the non-mandatory wordings of s. 84 of the Courts of Judicature Act 1964 (Act 91), the preliminary objection must fail. The court requested all parties to proceed with the crux of the matter.

[20] The questions posed by the plaintiff for this court's determination can be classified into three (3) main headings:

(a) the judicial power of the court;

(b) right to be heard; and

(c) the retrospective effect.

The First Question: The Judicial Power Of The Court

Plaintiff's Submission

[21] The plaintiff's submission was mainly premised around the legal issue that Parliament could not make any law to delegate the judicial power of the court and transferring it onto any other body (in this case, the SAC) when there is no enabling clause or express provision in the Federal Constitution permitting it to do so. By doing so, they are, not even, in contravention to art. 121(1) but also art. 4(1) of the Federal Constitution and hence void.

[22] The principle of *delegates non protest delegare*, which essentially means that a person to whom something has been delegated cannot delegate it further, was submitted to be of relevance. The Impugned Provisions are submitted to be worded to the effect that it usurps the judicial power of the court to decide the ultimate issues in dispute between the parties.

[23] The Impugned Provisions are reproduced here for ease of reference:

> **Section 56: Reference to Shariah Advisory Council for ruling from court or arbitrator**
>
> (1) Where in any proceedings relating to Islamic financial business before any court or arbitrator any question arises concerning a Shariah matter, the court or the arbitrator, as the case may be, shall:
>
> (a) take into consideration any published rulings of the Shariah Advisory Council; or
>
> (b) refer such question to the Shariah Advisory Council for its ruling.
>
> **Section 57: Effect of Shariah rulings**
>
> Any ruling made by the Shariah Advisory Council pursuant to a reference made under this Part shall be binding on the Islamic financial institutions under section 55 and the court or arbitrator making a reference under section 56.

[24] The plaintiff submitted that the courts are final arbiter between an individual and a state and between individuals *inter se*. (See *YAB Dato' Dr Zambry Abd Kadir & Ors v. YB Sivakumar Varatharaju Naidu; Attorney-General Malaysia (Intervener)* [2009] 4 CLJ 253).

[25] Thus, by imposing a duty on the court to refer any Shariah matter to SAC and by making the decision of the said body binding on the court with no involvement of the parties to the case ("the litigants") before such decision is passed, the right of natural justice has not been preserved. The court and the litigants have no role left but merely to adhere to it.

Amicus Curiae's Submission

[26] Bank Negara stressed upon the background on which the Impugned Provisions were enacted stating that it pressed by circumstances, namely, an apparent state of uncertainties with the development of the law by the courts from the various decisions on matters related to Islamic banking.

[27] This concern had been taken into consideration by the Court of Appeal in *Bank Islam Malaysia Berhad v. Lim Kok Hoe & Anor And Other Appeals* [2009] 6 CLJ 22 where they had decided the necessity to have uniformity in so far Islamic finance is concerned.

[28] As the result of this, The Central Bank of Malaysia Act 1958 (Revised 1994) (Act 519) was then repealed by Act 701.

[29] In reply to the submissions made by learned counsel for the plaintiff, Bank Negara Malaysia and the Attorney General's chambers submitted that the Impugned Provisions were enacted in pursuant to Item 4(k) of List I in the Federal List of the Ninth Schedule to the Federal Constitution which is to ascertain Islamic law and other personal law for the purposes of federal law.

[30] Since the judicial power of the court is derived from federal laws (which include the Impugned Provisions) and is premised on the interpretation of art. 121(1) of the Federal Constitution, by virtue of the majority decision of the Federal Court in *PP v. Kok Wah Kuan* [2007] 6 CLJ 341, the court is bound to rule that the Impugned Provisions are valid laws. In any event, this issue has nothing to do with art. 5 or 8 of the Federal Constitution. This should negate the issue of unconstitutionality of the impugned provisions. (See also *Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd* [2004] 1 CLJ 701; *Tan Sri Dato' Tajuddin Ramli v. Pengurusan Danaharta Nasional Bhd & Ors* [2002] 2 CLJ 758 and *Tan Sri Eric Chia Eng Hock v. PP* [2007] 1 CLJ 565.

Defendant's Submission

[31] The defendant adopts the submissions of both the *amicus curiae* in support of the validity of the Impugned Provisions.

The Second Question: The Right To Be Heard

Plaintiff's Submission

[32] Regarding the second question, the plaintiff submitted that by imposing a duty on the court to refer any Shariah matter to SAC and by making SAC's decision binding on the court with no involvement of the parties to the case before such decision is passed, the right of natural justice has been breached.

[33] This is because the litigants are deprived of any chance to be heard and have no role but to merely adhere to the SAC's decision. The decision of *Lee Kwan Woh v. PP* [2009] 5 CLJ 631 (FC) and in particular the judgment of Richard Malanjum, Chief Judge of Sabah and Sarawak in the well known Federal Court case *PP v. Kok Wah Kuan* [2007] 6 CLJ 341 were cited as the authorities to support this argument.

[34] Furthermore, the consequential effects of the Impugned Provisions are also in doubt. Does the SAC's ruling bind only the court that had made reference to it or does it also bind the courts that would be hearing the matter on appeal as well? Would this court have the right to review the SAC decision within the parameter set out by the Federal Court decision in *Petroliam Nasional Bhd v. Nik Ramli Nik Hassan* [2003] 4 CLJ 625?

[35] It is submitted that the plaintiff does not seek this court to oust the jurisdiction of the SAC completely. They acknowledge the need for SAC in its capacity as an expert advisor and to ensure uniformity in the development of Islamic banking law in Malaysia but the court should not be left bound to the shackles of the SAC's ruling.

Amicus Curiae's Submission

[36] Bank Negara Malaysia and the Attorney General's Chambers pointed out that the second question were premature in nature.

[37] According to s. 51(2) of Act 701, the SAC may determine its own procedures. In other words, the SAC are given the liberty to set their own process and procedure when a Shariah matter is referred to them. At the moment, the SAC has not published what their procedures would be like and there is no certain way of proving that the litigants are deprived of any chance to be heard and have no role in assisting the SAC to make the specific ruling. To conclude that their right to be heard is denied at this stage when no request or rejection has been given is indeed speculative in nature.

[38] One of the contentions which has been forcefully advanced by the Attorney General's Chambers was that the SAC is merely established to ascertain the Islamic laws. It is not to determine the matter of the party that was referred to them. Thus, their ascertainment of the Islamic law will not affect the right of the party to be heard. As a statutory expert, their ascertainment of the Islamic law should be binding as the court is not equipped with the expertise of ascertaining Islamic Law.

The Third Question: The Retrospective Effect

Plaintiff's Submission

[39] In respect to the third question, the plaintiff referred to the Court of Appeal decision in *Multi-Purpose Holdings Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2006] 1 CLJ 1121 and submitted that the Impugned Provisions cannot have retrospective effect on the transaction which was entered before Act 701 came into effect.

[40] This is because the SAC's ruling was not binding when the parties signed the financial facility. According to learned counsel for the plaintiff, the court should not read a law to have retrospective effect unless the act of Parliament specifically states so. Hence Act 701 ought to be read prospectively.

Amicus Curiae's Submission

[41] As against the above submissions, Bank Negara Malaysia and the Attorney General's Chambers submitted that the retrospective issue does not arise because what the court is now doing is to ascertain the validity of Islamic banking instrument now which requires the reference to Act 701. The fact that the financial facility was executed before Act 701 came into effect is not an issue and is of no relevance.

[42] Reliance was placed upon the case of *Tribunal Tuntutan Pembeli Rumah v. Westcourt Corporation Sdn Bhd & Other Appeals* [2004] 2 CLJ 617. There, the Court of Appeal stated that if the law does not give the cut-off point, then the parties could not imply such cut-off point. Since there is no limitation imposed on the SAC in the performance of its statutory duties in Act 701, the court should not add or infer any term to suggest any cut off point to Act 701.

Defendant's Submission

[43] As have been mentioned above, learned counsel for the defendant, Mr. Andrew Teh Leng Guan adopted the submissions of both *amicus curiae* as part of the defendant's submissions.

[44] In addition to that, the defendant submitted that there are many other disputable issues raised by the defendant in the pleadings. In so far as Act 701 is concerned where it mandates the court to refer any Shariah matter to the SAC and to be bound by its decision, it is not unconstitutional because the SAC is not involved to determine the entire dispute between the parties. The validity of the facilities is one aspect of the case in respect of the parties' dispute.

[45] It is submitted that the binding ruling of the SAC is no different from s. 97 of the Child Act 2001 (the Impugned Provision in *Kok Wah Kuan*'s case) when the length of the incarceration is left highly at the hand of the Ruler. Hence, the court has no power to determine the length of the sentence.

Court's Findings

[46] The court shall now delve into the three (3) questions posed before it.

Constitutional And Statutory Interpretation In General

[47] Before the court proceeds further, since this application is filed to move this court to determine the constitutionality of the Impugned Provisions, it is necessary to state briefly the principle of statutory interpretation.

[48] Basically there is a presumption in favour of the constitutionality of an enactment and unless it is found that a provision enacted results in palpably arbitrary consequences, the

court would refrain from declaring the law invalid as legislated by the legislature. Reliance is placed upon a decision of the Supreme Court of India in *R.K. Garg v. Union of India* [1981] 4 SCC 675, particularly to the following passage:

> The first rule is that there is always a presumption in favour of the constitutionality of a statute. This rule is based on the assumption, judicially recognized and accepted, that the legislature understands and correctly appreciates the needs of its own people, its laws are directed to problems made manifest by experience … Every legislation particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method … There may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid. The courts cannot … be converted into Tribunals for relief from such crudities and inequities. The court must therefore adjudge the constitutionality of such legislation by the generality of its provisions and not by its crudities or inequities or by the possibilities of abuse of any of its provisions … The court must defer to legislative judgment in matters relating to social and economic policies and must not interfere, unless the exercise of legislative judgment appears to be palpably arbitrary … (p. 690) (emphasis added).

[49] The following observations made in *Bharesh D.Parish v. Union of India* [2005] 5 SCC 421 are also relevant:

> … it is necessary that while dealing with economic legislation, this Court, while not jettisoning its jurisdiction to curb arbitrary action or unconstitutional legislation, should interfere only in those few cases where the view reflected in the legislation is not possible to be taken at all. (p. 486).

[50] The modern principle of statutory interpretation requires that the words of the legislation be read in their entire context and "in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament". (see *E.A. Driedger, Constitution of Statutes* (2nd edn. 1983), at p. 87). This is the prevailing and preferred approach to statutory interpretation (see *Rizzo & Rizzo Shoes Ltd. (Re)* [1998] 1 SCR 27, at para 21; *R v. Sharpe* [2001] 1 SCR 45, 2001, SCC2, at para 33; *Bell Express Vu Limited Partnership v. Rex* [2002] 2 SCR 559, 2002, SCC 42, at para 26). The modern

approach recognizes the multi-faceted nature of statutory interpretation. Textual considerations must be read in concert with legislative intent and established legal norms.

The First Question: The Judicial Power Of The Court

Article 121(1) Of The Federal Constitution

[51] It is trite law that the court in all circumstances must jealously guard and protect the Federal Constitution. Any slightest encroachment must not be tolerated. In *PP v. Oh Keng Seng* [1976] 1 LNS 107, Ajaib Singh J had this to say about guarding the Constitution:

> Article 4(1) of the Federal Constitution declares that the Constitution is the supreme law of the Federation and that any law passed after Merdeka Day which is inconsistent with the Constitution shall to the extent of the inconsistency be void. Under the fundamental liberties provisions of the Constitution it is provided in article 8(1) that all person are equal before the law and entitled to the equal protection of the law. It need hardly be stressed that it is the duty of the Court to jealously guard the Constitution and to see that nothing is enacted by the legislature which may offend the provisions of the Constitution particularly those which relate to the fundamental liberties of the subject. If any particular piece of legislation gives so much as a hint that it violates the Constitution the Court must unhesitatingly declare it null and void and of no effect. On the other hand of the impugned legislation is not inconsistent with or does not in any way violate the Constitution it is equally the duty of the Court to uphold its validity and give effect to it.

[52] Before March 1988, the judicial power of the court came directly from the Constitution, because by virtue of art. 121(1) of the Federal Constitution, it was declared that the judicial power of the Federation is vested in the High Court by federal laws.

[53] The old art. 121(1) of the Federal Constitution used to read:

> Subject to Clause (2) the judicial power of the Federation shall be vested in two High Courts of co-ordinate jurisdiction and status … and such inferior courts as may be provided by federal law.

[54] Position of the above said law was amended following the decision in *PP v. Dato' Yap Peng* [1987] 1 CLJ 550; [1987] CLJ (Rep) 284 when the Supreme Court had relied on the old art. 121(1) of the Federal Constitution to invalidate s. 418A of the Criminal Procedure Code. Eusoffe Abdoolcader SCJ (as he then was) interpreted judicial power to be as follows:

> Judicial power may be broadly defined as the power to examine questions submitted for determination with a view to the pronouncement of an authoritative decision as to rights and liabilities of one or more parties. It is virtually impossible to formulate a wholly exhaustive conceptual definition of that term, whether inclusive or exclusive, and as Windeyer J observed in the High Court of Australia in *The Queen v. Trade Practices Tribunal: Ex parte Tasmanian Breweries Pty. Ltd.* [1970] 123 CLR 361 (at p. 394): "The concept seems to me to defy, perhaps it were better to say transcend, purely abstract conceptual analysis", and again (at p. 396) that it is "really amorphous".

[55] Then came the amended art. 121(1) of the Federal Constitution by virtue of the Constitution (Amendment) Act 1988 (Act A704) which deleted the words "The judicial power of the Federation shall be vested in two High Courts …" and substituted them with the following:

> **Article 121: Judicial power of the Federation**
>
> (1) There shall be two High Courts of co-ordinate jurisdiction and status, namely:
>
> (a) …
>
> (b) …
>
> (c) (Repealed),
>
> and such inferior courts as may be provided by federal law and **the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.** (emphasis added)

[56] It was Abdul Hamid Mohamad PCA (as he then was) in *PP v. Kok Wah Kuan*'s case *(supra)* who took the ardent task to explain the current position of the law when he said:

> After the amendment, there is no longer a specific provision declaring that the judicial power of the Federation shall be vested in the two High Courts. What it means is that there is no longer a declaration that "judicial power of the Federation" as the term was understood prior to the amendment vests in the two High Courts. If we want to know the jurisdiction and powers of the two High Courts we will have to look at the federal law. If we want to call those powers "judicial powers", we are perfectly entitled to. But, to what extent such "judicial powers" are vested in the two High Courts depend on what federal law provides, not on the interpretation of the term "judicial power" as prior to the amendment. That is the difference and that is the effect of the amendment.

[57] In the same case, Richard Malanjum CJ (Sabah and Sarawak) arrived at the same conclusion but with different reasoning. This is what he had to say:

> [37] At any rate I am unable to accede to the proposition that with the amendment of art. 121(1) of the Federal Constitution (the amendment) the Courts in Malaysia can only function in accordance with what have been assigned to them by federal laws. Accepting such proposition is contrary to the democratic system of government wherein the courts form the third branch of the government and they function is to ensure that there is 'check and balance' in the system including the crucial duty to dispense justice according to law for those who come before them.
>
> [38] The amendment which states that "the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law" should by no means be read to mean that the doctrines of separation of powers and independence of the Judiciary are now no more the basic features of our Federal Constitution. I do not think that as a result of the amendment our courts have now become servile agents of a federal Act of Parliament and that the courts are now only to perform mechanically any command or bidding of a federal law.
>
> [39] It must be remembered that the courts, especially the Superior Courts of this country, are a separate and independent pillar of the Federal Constitution and not mere agents of the federal legislature. In the performance of their function they perform a myriad of roles and interpret and enforce a myriad of laws. Article 121(1) is not, and cannot be, the whole and sole repository of the judicial role in this country for the following reasons:

[58] The learned judge then gave eight reasons to support its reasons which could be found in the judgment itself.

[59] It is interesting to note that there were five corum in *PP v. Kok Wah Kuan*. The other three panel members concurred with the decision of Abdul Hamid Mohamad PCA.

[60] In other words, the reasons given by Abdul Hamid Mohamad PCA constituted a majority judgment but it does not negate the reasons given by Richard Malanjum CJ (Sabah and Sarawak).

[61] By virtue of the doctrine of *stare decisis*, the above majority decision acts as a binding authority upon this court. The effect is simple. It means that this court will only have jurisdiction and power as long as it is given by Parliament under the federal law.

Jurisdiction To Hear Islamic Banking Cases

[62] In Malaysia, Islamic law falls under the jurisdiction of the Syariah Courts which derive its power under a State law enacted pursuant to art. 74(2) of the Federal Constitution following para. 1, List II, Ninth Schedule to the Constitution (State List).

[63] However, in cases involving banking transactions based on Islamic principles, it is the civil courts that will have jurisdiction to hear these matters.

[64] The reason is that the law relating to finance, trade, commerce and industry falls within the ambit of the Federal List in List I, Ninth Schedule to the Federal Constitution.

[65] Abdul Hamid JCA (as he then was) in the case of *Bank Kerjasama Rakyat Malaysia Bhd v. Emcee Corporation Sdn Bhd* [2003] 1 CLJ 625, dealt with a matter involving Islamic banking facility. He said:

> As was mentioned at the beginning of this judgment the facility is an Islamic banking facility. But that does not mean that the law applicable in this application is different from the law that is applicable if the facility were given under the conventional banking.

[66] However, should there arise any question concerning a Shariah matter, the court shall take into consideration any published rulings of the SAC or refer such question to the SAC for its ruling. Any ruling made by them shall be binding on the court.

[67] This is provided under the Impugned Provisions of Act 701. A

[68] Prior to Act 701, the power of the court to determine questions concerning Shariah matter in respect of Islamic banking cases remain intact. The court still had its discretion to refer such question to the SAC for its ruling and that ruling shall only be B taken into consideration by the court in arriving at its decision. This rules and procedures were enunciated in ss. 16B (8) and (9) of the repealed Central Bank of Malaysia Act 1958 ("the Repealed CBA 1958").

C

[69] For ease of reference the aforesaid provisions are reproduced here:

Section 16B: Establishment of Syariah Advisory Council

(8) Where in any proceedings relating to Islamic banking D business, takaful business, Islamic financial business, Islamic development financial business, or any other business which is based on Syariah principles and is supervised and regulated by the Bank before any court or arbitrator any question arises concerning a Syariah matter, the court or the arbitrator, as the case may be, may – E

(a) take into consideration any written directives issued by the Bank pursuant to subsection (7); or

(b) refer such question to the Syariah Advisory Council for its ruling. F

(9) Any ruling made by the Syariah Advisory Council pursuant to a reference made under paragraph (8)(b) shall, for the purposes of the proceedings in respect of which the reference was made:

(a) if the reference was made by a court, be taken into G consideration by the court in arriving at its decision; and

(b) if the reference was made by an arbitrator, be binding on the arbitrator. (emphasis added)

[70] Then came the decision of *Arab-Malaysian Finance Bhd v. H Taman Ihsan Jaya Sdn Bhd & Ors; Koperasi Seri Kota Bukit Cheraka Bhd (Third Party) And Other Cases* [2009] 1 CLJ 419 which created some uncertainty within the fraternity of the Islamic banking community in Malaysia.

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[71] In that case, the learned judge was of the view that the Bai Bithaman Ajil ("BBA") is not a valid facility under the Shariah. The case was appealed to the Court of Appeal and in *Bank Islam Malaysia Berhad v. Lim Kok Hoe & Anor And Other Appeals* [2009] 6 CLJ 22, the Court of Appeal overruled the decision of the High Court and said that "judges in civil court should not take upon themselves to declare whether a matter is in accordance to the Religion of Islam or otherwise".

[72] It was following the Court of Appeal decision in *Lim Kok Hoe*, that the Repealed CBA 1958 was repealed with Act 701 which came into operation on 25 November 2009.

[73] Interestingly, the term "may" in s. 16 of the Repealed Act was replaced with the mandatory term of "shall" in s. 56 of Act 701. Using the purposive approach in interpreting statutes, it could be concluded that the intention of Parliament in changing the word from "may" to "shall" indicates the mandatory and binding effect.

Power And Jurisdiction Of The Shariah Advisory Council

[74] Shariah or Islamic laws originated from the direct and divine commandment of Allah; but there are provisions or power given to man in order to interpret and expand Divine commandment. This can be done by means of analogical deductions or through other juristic processes. (See Abdul Rahman I. Doi, *Non Muslim Under Shariah (Islamic Law)*, Ta Ha Publishers Ltd, London, 1978, p. 6).

[75] The freedom to interpret Islamic laws by qualified jurists and scholars has lead to a myriad diversity of opinions (al-ra'yu) among them. These differences of opinion are mainly due to juristic issues of the Islamic law. It could differ for various reasons such as the use of different methodologies of Islamic jurisprudence, different approach towards an issue, different understanding of the Quran and sunnah etc. Furthermore, legal opinion, to a certain extent, is influenced by characteristics of races, societies and epochs, depending upon their customs, traditions, predilections, peculiarities and business culture of a particular society. As observed by Ibn Qayyim Al-Jawziyah in *I'lam al- Muwaqqi'in 'An Rabb al-'Alamin*, vol. III, ed. Mahyu al-Din Abd. Hamid, Cairo, 1950, p. 1:

> Legal interpretation should change with the change in times, places, conditions, intentions and customs. Ignorance of this fact has resulted in grievous injustice to the Shariah and has caused many difficulties, hardships, and sheer impossibilities, although it is known that the noble Shariah, which serves the highest interests of mankind; would not sanction such results.

[76] From these differences, it also shows that Islam recognizes and tolerates different views as long as it is not against the fundamentals of the religion. To some scholars, these differences of opinion are regarded as a blessing as it allows diversity within unity ie, unity in basic principles, and diversity regarding details (furu'). The tangible manifestation of differences (ikhtilaf) in Islamic law is prevalence of at least seven major schools of thought which have survived to this day (although only the top four school of thoughts ie, the Hanafi, Maliki, Shafie and Hanbali being the most famous with the largest number of followers around the globe). (See Mohammad Hashim Kamali, *An Introduction to Shariah*, Ilmiah Publishers, 2006, p. 91).

[77] Diversity of rulings and differences of opinion are the reasons why Islamic Law continues to develop according to time. Just like Common Law, if there are no differences of opinion and development of the law, it will remain like a dead coral reef, a structure of fossil that remains still at the bottom of the ocean.

[78] In the light of the above, to ensure that the development of Islamic financial instruments progresses smoothly and orderly, the establishment of one supervisory authority in a country is very important. This supervisory authority should have the power to regulate a uniformed interpretation of Islamic law within the sphere of Islamic finance and banking in that country and may choose the best opinion in its decision-making process after taking into consideration all of the authorities, custom of the locality etc.

[79] In Malaysia, that supervisory authority is the SAC. The SAC was established on 1 May 1997 as the highest Shariah authority in Islamic finance in Malaysia.

[80] Section 52 of Act 701 clearly delineated the functions of the SAC. It would be sufficient for one to understand the functions of the SAC just by bare reading of that section. Section 52 reads:

Section 52: Functions of Shariah Advisory Council:

(1) The Shariah Advisory Council shall have the following functions:

(a) to **ascertain** the Islamic law on any financial matter and issue a ruling upon reference made to it in accordance with this Part;

(b) to advise the Bank on any Shariah issue relating to Islamic financial business, the activities or transactions of the Bank;

(c) to provide advice to any Islamic financial institution or any other person as may be provided under any written law; and

(d) such other functions as may be determined by the Bank.

(2) For the purposes of this Part, "ruling" means any ruling made by the Shariah Advisory Council for the **ascertainment of Islamic law** for the purposes of Islamic financial business. (emphasis added)

[81] My learned sister Rohana J had this to say with regards to the SAC in *Tan Sri Abdul Khalid Ibrahim v. Bank Islam Malaysia Bhd & Another Case* [2010] 4 CLJ 388 which aptly describes the importance of the SAC:

[18] To my mind there is good reason for having this body. A ruling made by a body given legislative authority will provide certainty, which is a much needed element to ensure business efficacy in a commercial transaction. Taking cognisance that there will always be differences in views and opinions on the Syariah, particularly in the area of muamalat, there will inevitably be varied opinions on the same subject. This is mainly due to the permissive nature of the religion of Islam in the area of muamalat. Such permissive nature is evidenced in the definition of Islamic Banking Business in s. 2 of the Islamic Banking Act 1983 itself. Islamic Banking Business is defined to mean, banking business whose aims and operations do not involve any element which is not prohibited by the Religion of Islam. It is amply clear that this definition is premised on the doctrine of "what is not prohibited will be allowed". It must be in contemplation of the differences in these views and opinions in the area of muamalat that the legislature deems it fit and necessary to designate the SAC **to ascertain the acceptable Syariah position.** In fact, it is well accepted that a legitimate and responsible Government under the doctrine of siasah-as-Syariah is allowed to choose, which amongst

> the conflicting views is to be adopted as a policy, so long as they do not depart from Quran and Islamic Injunction, for the benefits of the public or the ummah. The designation of the SAC is indeed in line with that principle in Islam. (emphasis added).

[82] This court respectfully adopts the above statement.

[83] In *Lim Kok Hoe*, Raus Sharif JCA (as he then was) commented on the SAC as follows:

> [35] Thus, we already have the legal infrastructure to ensure that the Islamic banking undertaken by the banks in this country does not involve any element which is not approved by the Religion of Islam. The court, will have to assume that the Syariah advisory body of the individual bank and now the Syariah Advisory Council under the aegis of Bank Negara Malaysia, would have discharge their statutory duty to ensure that the operation of the Islamic banks are within the ambit of the Religion of Islam.

[84] Having regard to the above, it is clear that the SAC was established as an authority for the ascertainment of Islamic law for the purposes of Islamic banking business, takaful business and Islamic financial business. Note that the key words here are "ascertainment of Islamic law".

[85] Therefore, if the court refers any question under s. 56(1)(b) of Act 701 to the SAC, the SAC is merely required to make an ascertainment, and not determination, of Islamic laws related to the question.

[86] This is in line with the above stated s. 52(2) of Act 701.

[87] The root word of "ascertain" used in s. 51 of Act 701 is also similar to the word in Item 4(k) ie, for the "ascertainment" of Islamic law and other personal laws for purposes of federal law.

[88] Such similarity is not a mere coincidence and bearing some important significance. Reference is made to List II in the State List of the Ninth Schedule to the Federal Constitution where it states that the jurisdiction of the State is for "the determination of matters of Islamic Law".

[89] The differences between "ascertainment" and "determination" were emphasized by the Attorney General's Chambers in their written submissions and during the oral hearing of this application.

[90] Since both words are not defined under the Federal Constitution, it may permissible to refer to the dictionary to find out the meaning of the words as they understood in the common parlance.

[91] "Ascertain" has been defined as "to find out the true or correct information about something" (see *Oxford Advanced Learner's Dictionary* (6th edn)); "known and made certain" (see *Words, Phrases & Maxims, Legally & Judicially Defined* (vol. 2)) and "memastikan", such as, "to ~ ascertain that the facts are correct" (see Kamus Inggeris Melayu Dewan).

[92] "Determine" on the other hand is defined as "to discover a fact about something; to calculate something exactly; to make something happen in a particular way or be of a particular type" (see *Oxford Advanced Learner's Dictionary* (6th edn); "the expression determination signifies an effective expression of opinion which ends a controversy or a dispute by some authority to whom it is submitted under a valid law for disposal" (see *Words, Phrases & Maxims, Legally & Judicially Defined* (vol. 2)) and "act of settling, fixing yang bermaksud penentuan, penetapan, pemutusan, memutuskan, misalnya, "the ~ of company policy" (see Kamus Inggeris Melayu Dewan).

[93] It is the court's considered view that there are differences between these two words.

[94] The Federal Constitution has given the power to Parliament to make laws with respect to any of the matters enumerated in the Federal List which includes the ascertainment of Islamic law and other personal laws for purposes of federal law, (see art. 74 and Item 4(k) in the Federal List of the Ninth Schedule to the Federal Constitution).

[95] Act 701 is a federal law and its contents are consistent to the words employed in the Federal Constitution. In this sense, it can be seen that the SAC is not in a position to issue a new hukm Syara' but to find out which one of the available hukm is the best applicable in Malaysia for the purpose of ascertaining the relevant Islamic laws concerning the question posed to them.

[96] For example, in a matter where there are differences of opinion regarding the validity of a certain Islamic finance facility, SAC can be referred to ascertain which opinion of the jurist is

applicable in Malaysia. This ascertainment of Islamic law will be binding upon the courts as per the Impugned Provisions. It will then be up to the courts to apply the ascertained law to the facts of the case. At the end of the matter, the application and final decision of the matter remains with the court. The court still has to decide the ultimate issues which have been pleaded by the parties. After all, the issue whether the facility is Shariah compliant or not is only one of the issues to be decided by the court.

[97] This is in line with s. 52(2) of Act 701 which provides:

> (2) For the purposes of this Part, "ruling" means any ruling made by the Shariah Advisory Council for the **ascertainment of Islamic law** for the purposes of Islamic financial business. (emphasis added)

[98] Such conclusion may have been different if the word "determine" was used instead as this would create a different function of the SAC which is not provided in the Federal Constitution.

[99] As Thomson CJ said in *Lee Lee Cheng v. Seow Peng Kwang* [1958] 1 LNS 32:

> It is axiomatic that when different words are used in a statute they refer to different things and this is particularly so where the different words are, as here used repeatedly …

[100] It is a well-established canon of construction that where the draftsman uses different words, he presumably intended a different meaning.

[101] Thus, the court must try if possible to attribute to each one of such expressions a different legal connotation and it would be necessary to try and determine what the difference is. This is what the court is now doing.

[102] The SAC cannot be said to perform a judicial or quasi-judicial function. The process of ascertainment by the SAC has no attributes of a judicial decision. The necessary attribute of the judicial decision is that it can give a final judgment between two parties which carries legal sanction by its own force. It appears to the court that before a person or persons or a body or bodies can be said to exercise judicial powers, he or it must be held that they

derive their powers from the State and are exercising the judicial power of the State. An attempt was made to define the words "judicial" and "quasi-judicial" in the case of *Cooper v. Wilson & Ors* [1937] 2 KB 309. The relevant quotation reads:

> A true judicial decision presupposes an existing dispute between two or more parties, and then involves four requisites: (1) The presentation (not necessarily orally) of their case by the parties to the dispute; (2) If the dispute between them is a question of fact, the ascertainment of the fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence; (3) If the dispute between them is a question of law, the submission of legal argument by the parties, and (4) a decision which disposes of the whole matter by a finding upon the facts in dispute and application of the law of the land to the facts so found, including where required a ruling upon any disputed question of law. A quasi-judicial decision equally presupposes an existing dispute between two or more parties and involves (1) and (2), but does not necessarily involve (3) and never involves (4). The place of (4) is in fact taken by administrative action, the character of which is determined by the Minister's free choice.

[103] The court has no hesitation in holding that the process employed by the SAC is not a judicial process at all. The function of the SAC is confined to the ascertainment of the Islamic law on financial matters.

[104] There is nothing in the Impugned Provisions from which it could be inferred that the SAC really exercising judicial functions. There are no contending parties before the SAC. The issue relating to Islamic financial business is referred to it by the court or arbitrator. The SAC does not require evidence to be taken and witnesses to be examined, cross-examined and re-examined.

[105] This is not a case where the court transfers part of its judicial powers and functions to the SAC. The court is of the view that the sole purpose of establishing the SAC is to create a specialized committee in the field of Islamic banking to ascertain speedily the Islamic law on financial matters which can command the confidence of all concerned in the sanctity, reliability, quality and consistency in the interpretation and applications of Shariah principles for Islamic finance transactions before the court.

[106] It is not an attempt by the executive to take over gradually the judicial power traditionally exercised by the courts under safeguards which ensure the competence, independence and impartiality of the judges, and replacing by persons who have neither a judicial background nor specialized knowledge and by persons who retain lien and loyalty to executive branch.

[107] It is also the court's considered view that, the rulings passed by the SAC are not fatwas within the context of administration of Islamic laws in Malaysia.

[108] According to the States and Federal Territories Administration of Islamic Law Act, Enactment and Ordinance, only States and Federal Territories fatwa committees can issue fatwa which must be in accordance with the enacted procedures and then published in the Gazette. Otherwise the statement would remain as mere decision/opinion of the Muftis.

[109] Hence, the ruling issued by the SAC is an expert opinion in respect of Islamic finance matters and it derives its binding legal effect from the Impugned Provisions enacted pursuant to the jurisdiction provided under the Federal Constitution.

[110] In the context of Islamic banking and takaful, every ruling or resolution made by the SAC, comprising members who are qualified in Shariah, economics, laws and finance and appointed based on standards enunciated in s. 53 of Act 701, is regarded as a collective ijtihad.

[111] There are some quarters who feel sceptical about the qualification and competency of the SAC members as Mujtahid. This is perhaps not surprising in view of the fact that the definition of Mujtahid itself is still a matter of considerable controversy.

[112] The SAC members are entrusted to ascertain on unclear matters in Islamic finance by providing legal Shariah opinion extracted from Islamic sources through a process of ijtihad on a particular religious matter in the light of the Shariah rules and Islamic jurisprudence principles.

[113] The word Ijtihad means to strive or an exertion by the Mujtahid (one who carries out ijtihad) in deriving the rules of Shariah on particular issues from the sources. It is also interpreted as personal reasoning. Their formulation necessitates a certain

amount of effort on the part of the mujtahid. Ijtihad may consist of an interpretation of the source materials and inference of rules from them, or it may consist of an opinion regarding the Shariah ruling of a particular issue (see Mohammad Hashim Kamali, *An Introduction to Shariah*, Ilmiah Publishers, 2006, p. 22 & *The Principles of Islamic Jurisprudence*, The Islamic Texts Society, 2003).

[114] Hence, the purpose of ijtihad is to discover the law from the texts of the Quran and the Sunnah and to apply it to the set of facts awaiting decision. (See Imran Ahsan Khan Nyazee, *Theories of Islamic Law: The Methodology of Ijtihad*, Islamic Book Trust, Kuala Lumpur, 2002, p. 287).

[115] It is a process to determine a new ruling not covered by the Quran, the Sunnah and Ijma'. Thus, only qualified persons could undertake such process.

[116] The theory of ijtihad specifies the qualifications of a Mujtahid such as knowledge of the sources of Shariah, knowledge of Arabic and familiarity with the prevailing customs of society, upright character, as well as the ability to formulate independent opinion and judgment (see Mohammad Hashim Kamali, *An Introduction to Shariah,* Ilmiah Publishers, 2006, p. 156).

[117] However, in reality, it is hard to find an individual who has attained the rank of a true Mujtahid. Therefore, attempts have been made to declassify a Mujtahid into three sub-categories which are:

i. A full-fledged mujtahid (al-mujtahid al mutlaq) – One who occupies the highest rank of ijtihad.

ii. A mujtahid within a school of law (mujtahid al-madzhab) – One who is a scholar within a particular school of thought.

iii. A mujtahid on a particular issue (mujtahid al masail) – One who is well versed in a particular subject or an expert within a realm of a specific matter.

(see Al-Harrani, Ahmad bin Hamdan, *Sifat al-Fatwah*, Beirut, al-Maktab al-Islami, 1977, p. 16; Al Taymiyyah, *Al-Musawwaddah fi Usul-Fiqh*, Cairo, Al-Madani press, (ND), pp. 487-490).

[118] According to Abu-Hamid Al-Ghazali (Imam Al-Ghazali): A

> … becoming learned in all of these sciences as a requisite for the post of mujtahid is only required of a full-fledged mujtahid (al-mujtahid al mutlaq) who gives fatwa in all spheres of the law. Ijtihad, in my opinion, should not be an indivisible entity; a scholar may attain the rank of ijtihad in some areas of the law to the exclusion of others. Thus, a person who is learned in qiyas (analogical deduction) should be able to practice ijtihad in any qiyas oriented judgment, even if he is not an expert on Hadith. B

(see al-Ghazali, *Al-Mustasfa fi Ilm al-Usul*, Beirut, Dar al-Kutub al-Ilmiyyah, 1993, 1st edn, p. 345). C

[119] On that premise, those who are experts or specialists in Islamic law of contract or Islamic banking would be eligible to be a Mujtahid Masail and issue opinion and/or ruling relating to matters in Islamic banking and finance. D

[120] There is no doubt that the list of SAC members for 2010/2013 given by Bank Negara consisting of those who are qualified individuals and have vast experience in banking, finance, economics, law, application of Shariah and administration of Islamic law. They are: E

1. Dr Mohd Daud Bakar (Chairman)
2. Dato' Dr Abdul Halim Ismail (Deputy Chairman) F
3. Tun Abdul Hamid Haji Mohamad
4. Tan Sri Datuk Sheikh Ghazali Abdul Rahman
5. Sahibus Samahah Dato' Haji Hassan Haji Ahmad G
6. Dr. M. Anwar Ibrahim
7. Prof. Dr. Ashraf Md Hashim
8. Prof. Madya Dr. Engku Rabiah Adawiah Engku Ali H
9. Prof. Madya Dr. Mohamad Akram Laldin
10. Dr Aznan Hassan
11. Dr Rusni Hassan I

[121] Be that as it may, that is not the case here as the function of the SAC by virtue of the Impugned Provisions is merely to ascertain the Islamic laws concerning the question referred to them. Reading the provisions carefully, the court fails to see anywhere in the SAC's powers which allows the SAC to make any determination of Islamic law or to issue fatwa. The provisions which were enacted pursuant to item 4(k) in the federal list of the Ninth Schedule to the Federal Constitution only allows Parliament to make law in respect of "ascertainment" of Islamic law for purposes of federal law. Such is the way it is worded and the court is bound to follow it word for word.

[122] There is neither rhyme nor reason for the court to reject the function of the SAC in ascertaining which Islamic law to be applied by the civil courts in deciding a matter. Should this function be ignored, it would open the floodgate for lawyers and cause a tsunami of applications to call any expert at their own interest and benefit, not only from Malaysia but also other countries in the world who might not be familiar to our legal system, administration of Islamic law and local conditions just to challenge the Islamic banking transaction in this country.

[123] Allowing foreign experts to be called as witnesses to challenge the Islamic banking transaction in Malaysia will no doubt lead to increase in expense and the length of the proceedings.

[124] The importance of ensuring that litigation is prosecuted expeditiously has long been a major concerned to those involved in the administration of justice. The guiding principle is reflected in the maxim, *interest reipublicate ut sit finis litium* ("it is in the public interest that there be an end to litigation").

[125] To have a council that is dedicated to provide a binding ascertainment of Islamic law will indeed be helpful and convenient not only to the civil courts but also to the public as a whole. The Islamic banking community can now operate in a well regulated environment. This will bring certainty in Islamic banking in Malaysia. Legal practitioners will also be relieved to know that they can refer to the SAC rulings to advice their clients on the position of the law regarding Islamic banking, finance, takaful etc.

[126] Furthermore, the Quran also teaches us that we are bound to ask from those who know when we know not. This can be seen in a chapter called The Bee (An-Nahl 16, verse 43) which says:

> ... if ye realize this not, ask of those who possess the Message.

[127] The practice of the civil courts referring questions on Islamic law arising in the courts is not something new. The civil courts in Johore prior to the independence were obliged to refer questions on Islamic law arising in the court to the Mufti and to determine the matter in accordance with the Mufti's opinion (see Moshe Yegar, Islam and Islamic Institutions in British Malaya: Policies and Implementation, p. 165).

[128] The civil court is not bound to accept a mufti's fatwa as it is entitled to expound what the Islamic law on a given topic, but at the same time, the civil court are equally not bound to reject the opinion stated in the fatwa. This was the stand of Salleh Abbas, FJ (as he then was) in *Re Dato' Bentara Luar decd Haji Yahya bin Yusof & Anor v. Hassan bin Othman & Anor* [1982] 1 LNS 16. He also had this to say:

> In our view as the opinion was expressed by the highest Islamic authority in the State, who had spent his lifetime in the study and interpretation of Islamic law and there being no appeal against the fetwa to His Highness the Sultan in Executive Council under the relevant State Enactment – ie, Enactment No. 48, now reenacted by Enactment No. 14 of 1979 – we really have no reason to justify the rejection of the opinion, especially when we ourselves were not trained in this system of jurisprudence and moreover the opinion is not contrary to the opinions of famous authors of books on Islamic law.

[129] In *Isa Abdul Rahman & Satu Lagi lwn. Majlis Agama Islam, Pulau Pinang* [1996] 1 CLJ 283, expert evidence was sought in the High Court from the mufti of Penang and a member of the state fatwa committee. The High Court judge stated that members of the fatwa committees were more qualified than civil court judges in matters of Islamic law. The Supreme Court was of the opinion that when civil court heard a claim for an order and if a question regarding the Islamic law should arise in the course of such hearing, the parties involved may call experts in the religion of Islam to give evidence at the hearing or the court may refer question to the fatwa committee for certainty of the matter.

[130] In *Hjh Halimatussadiah Hj Kamaruddin v. Public Service Commission Malaysia & Anor* [1992] 1 CLJ 413; [1992] 2 CLJ (Rep) 467 the court had to decide on the constitutionality of the dismissal of a female public servant who wore a face veil (purdah) when on duty which was in contravention to a government circular. Reference to Quranic verses, hadiths and treatises were made by the mufti of the Federal Territory in giving a fatwa at the High Court. The court concluded something similar to the decision of *Re Dato' Bentara Luar (decd) Haji Yahya bin Yusof & Anor v. Hassan bin Othman & Anor* in saying that since the mufti had spent his whole life in the study, teaching of, and interpreting, the Islamic. The court could not find any valid reason to reject the views expressed by the highest Islamic authority in the Federal Territory.

[131] In the case of *Dalip Kaur Gurbux Singh v. Pegawai Polis Daerah (OCPD), Bukit Mertajam & Anor* [1991] 3 CLJ 2768; [1991] 1 CLJ (Rep) 77, it was a matter to determine whether a Muslim convert had renounced the Islamic faith before his death. By consent of all the parties, the Supreme Court directed the Judicial Commissioner to refer certain questions of Islamic law that arose to the fatwa Committee of Kedah. The Judicial Commissioner referred the questions to the fatwa Committee and, after receiving the fatwa, confirmed his earlier findings and decision at the High Court.

[132] After briefly stating the Islamic jurisprudence and principles of fatwa, ijtihad and mujtahid and after concluding that the ruling of the SAC is not to be ranked as a fatwa from a fatwa making body but to only ascertainment of Islamic law and deriving the jurisprudence of the evidential weight to be given to a fatwa in court, it is incumbent upon the court to remind itself that not only is the SAC ruling binding but there are many cases where the court had explained in intrinsic detail the need to adopt the views of these experts in the realm of Shariah.

Conclusion

The First Question: The Judicial Power Of The Court

[133] For the reason stated above, the court would answer question 1(a) in the negative and question 1(b) also in the negative as the decision making power remains with the court and is not abdicated to the SAC.

The Second Question: The Right To Be Heard

[134] Both question 2(a) and (b) are answered in the negative.

[135] The court agrees with the views of the *amicus curiae* that this issue is premature as the SAC have not published their procedure and the plaintiff cannot at this instance prove that they have a right to be heard or have been denied of their right to be heard. To answer it now would expose the court to making a decision based on mere speculation.

[136] It is pertinent to note that in every case, it is not necessary to make a provision for a hearing. The concept of natural justice is not a straight-jacket formula. It, on the other hand, depends upon the fact of the case, nature of the enquiry, the rules under which the body or the tribunal is acting. (See *Lachman Das v. State of Punjab* [1963] 2 SCR 253, *Chairman, Board of Mining Examination v. Ramjee* at 262 and *Haryana Financial Corpn v. Jagdamba Oil Mills* [2002] 3 SCC 496).

[137] Furthermore, the relationship between the plaintiff and defendants in this instance case, is essentially in the realm of contract. In the circumstances of the case, right to be heard is desirable corrective but not an indispensable imperative.

The Third Question: The Retrospective Effect

[138] As for question 3, the answer is also in the negative.

[139] The arguments by learned counsel for the plaintiff on this point are not compelling. Act 701 carries no retrospective effect.

[140] Since there is no limitation imposed on the SAC in the performance of its statutory duties in the Act 701 prior to 25 November 2009 (which is the date the Act is in force), the court should not add or infer any term to suggest any cut off point to Act 701 (see *Tribunal Tuntutan Pembeli Rumah v. Westcourt Corporation Sdn Bhd & Other Appeals*).

[141] Be that as it may, this case was registered on 28 January 2010, a date well after the date Act 701 came into force, therefore, the retrospective issue is of no relevance. At the time the parties signed the agreements which were somewhere in 2003, there were no disputes which required the reference to the SAC.

A

Orders

[142] As a result, the plaintiff is not entitled to the declaration which he seeks. This case is now to be sent to the Deputy Registrar for Case Management on 11 May 2011.

B

[143] Since this is the first time the court is dealing with new ss. 56 and 57 of the Central Bank of Malaysia Act 2009 there is no order as to costs.

[144] Orders accordingly.

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